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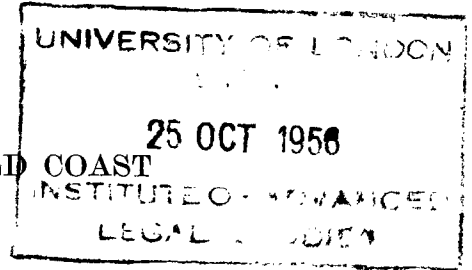
35,1955

No. 6 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST SESSION).



BETWEEN

ELIZABETH ANIMA (Defendant) *Appellant*

AND

10 AKWASI AHYEYE, substituted for KWAME
DWAA (Plaintiff) *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

1. This appeal is from a judgment of the West African Court of Appeal (Gold Coast Session), dated the 9th January, 1952, dismissing an appeal from a judgment of Jackson, J., in the Divisional Court, Kumasi, dated the 30th March, 1950, granting leave to the plaintiff Kwame Dwaa to issue execution against certain property in Kumasi under a consent Judgment dated the 23rd March, 1939, in the Divisional Court, Kumasi, under which (*inter alia*) the Appellant was required to give up possession of the said property within a fortnight.

pp. 34-36.
pp. 26-30.
pp. 4-5.

20 2. The principal issue to be determined on this appeal is whether Jackson, J., had jurisdiction to grant leave to issue execution under the said judgment of 23rd March, 1939, notwithstanding a purported review of the latter judgment by the trial judge (Bannerman, J.) dated the 24th July, 1939, in favour of the Appellant's claim to retain possession of the said property.

p. 12.

3. By a Writ of Summons dated the 10th November, 1938, the plaintiff instituted

pp. 1-2.

THE PRESENT SUIT

30 against 4 defendants—(1) Kwame Amankwatia (Bantamahene). (2) Kwame Atta. (3) J. B. Abaidoo and (4) the Appellant, claiming a declaration of title to the compound house situate on leasehold premises No. 23 Bantama, Kumasi, and £120 damages for trespass, wrongful sale, use and occupation. The Particulars of Claim stated that (i) the first defendant had given the land on which the compound house stood to the plaintiff and no ground rent had ever been demanded or paid, (ii) the plaintiff had left the compound house in charge of one John Mensah and through him had regularly paid the town rate of £2, (iii) on the plaintiff's return to Kumasi he found that the compound house had been sold by the

p. 3 :—
ll. 7 *et seq.*
ll. 14 *et seq.*
ll. 18 *et seq.*

ll. 23 *et seq.* first defendant through the second defendant to the fourth defendant, the third defendant being the auctioneer, and (iv) neither the plaintiff nor John Mensah had been served with a Writ of Summons before the compound house was sold.

pp. 4-5. 4. The case came before Bannerman, J., in the Divisional Court, Kumasi, on the 23rd March, 1939, and a consent judgment was pronounced in the following terms :—

p. 4, ll. 22 *et seq.* “ This case is, by consent, settled as follows :—

(1) The 4th Defendant is to give up possession of the house in dispute within a fortnight from to-day's date. 10

(2) The 1st Defendant is to pay the 4th Defendant the sum of £30 2s. 0d. being purchase price. This amount is to be paid within a fortnight from to-day's date.

(3) The Plaintiff is to pay the 1st Defendant the sum of £11 16s. 0d. within a fortnight from to-day's date.

(4) The Plaintiff wholly and unconditionally abandons his claim for £120 damages in his writ of summons.

(5) The Plaintiff unconditionally withdraws the case against the 2nd and 3rd Defendants with costs.

(6) The Plaintiff is to receive the sum of £12 12s. 0d. from 20 the 1st Defendant being assessed costs herein.

(7) The Plaintiff is to pay the 4th Defendant the sum of £7 upon production of receipts by the Court for ground rents.

Judgment accordingly.”

pp. 5-6. 5. A Motion *ex parte* by the Appellant to set aside the Order made on the 23rd March, 1939, or for direction was withdrawn on the 25th May, 1939.
p. 8.

p. 8. 6. A further Motion *ex parte* by the Appellant to construe the order made on the 23rd March, 1939, or for direction was withdrawn with leave on the 3rd July, 1939. 30
p. 10, ll. 22 *et seq.*

p. 11. 7. On the 12th July, 1939, the Appellant gave notice of a Motion praying the Court to review the order made on the 23rd March, 1939. An affidavit of the Appellant in support of the said Motion for review, after referring to the previous proceedings and the terms of the consent order, stated *inter alia* as follows :—
pp. 11-12.
p. 9 :—

ll. 13 *et seq.* (1) That she was prepared to give up possession of the compound house but the first defendant had failed to pay the £30 2s. 0d. to her as ordered by the Court.

ll. 17 *et seq.* (2) That the plaintiff had escaped and the Appellant could not find his whereabouts to pay her the £7 ground rents as ordered by 40 the Court.

(3) That the Appellant was being pressed for payment of ground rents and water rates in respect of the house. ll. 20 *et seq.*

(4) That in view of the failure of the first defendant and the plaintiff respectively in complying with the order of the Court the Appellant prayed for Special Leave to review the order of 23rd March, 1939. p. 12, ll. 1 *et seq.*

8. The power of the Court to review a judgment is contained in Order 31 in the 3rd Schedule to the Courts Ordinance, paragraph 1 of which reads as follows :—

10 “ Any Judge, Magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, or a reference shall have been made upon a special case, and such appeal or reference is not withdrawn), and upon such review it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary, or confirm his previous judgment or decision, or to order a non-suit.”

9. The Appellant's said Motion for review was heard before Bannerman, J., on the 24th July, 1939, and the learned judge's decision thereon is recorded as follows :— p. 12.

“ *By the Court :*

p. 12, ll. 35 *et seq.*

If the 1st Defendant has failed within the time-limit to pay the £30 2s. 0d. to the 4th Defendant then the 4th Defendant should retain possession of the house.”

10. On the 27th November, 1940, the plaintiff gave notice of a Motion for an order to restrain the Appellant from alienating the property in dispute. In support of the said Motion the plaintiff swore an affidavit in which he referred to the previous proceedings and stated *inter alia* that he had, a few days after the judgment of 23rd March, 1939, tendered “ through the first defendant ” the sum of £6 15s. 0d. to be given to the Appellant but that she had refused to accept it. p. 13.
pp. 13-14.
p. 14, ll. 17 *et seq.*

11. On the 3rd December, 1940, the plaintiff's Motion to restrain the Appellant from alienating the property was heard by Fuad, J., and dismissed, apparently on the ground of the decision of Bannerman, J., dated 24th July, 1939. p. 15.

12. On the 16th February, 1950, the plaintiff gave notice of a Motion for leave to proceed to execution against the Appellant and for the substitution of the name of Nana Kwaku Gyawu III Bantamahene for that of the first defendant (now deceased) in respect of the consent judgment of the 23rd March, 1939. In an affidavit sworn by the plaintiff in support of the said Motion he stated *inter alia* that the judgment against the Appellant had remained unsatisfied for over six years and the plaintiff now desired to proceed to execution against the Appellant and that execution had not been issued owing to the plaintiff's illness. p. 16.
p. 17.
ll. 20 *et seq.*

pp. 18-19.

13. On the 22nd February, 1950, the plaintiff's Motion for leave to proceed to execution was heard before Jackson, J., and was dismissed. The judgment is recorded as follows:—

p. 19, ll. 18 *et seq.*

“ Court :

There is nothing in the judgment upon which the Plaintiff can proceed to execution against either Elizabeth Anima or Kwame Amankwatia and it follows his successor in title. Without calling upon the defendants I dismiss the motion. The defendants waive any question of costs.”

p. 19.

p. 22, l. 16.

pp. 22-23.

14. The plaintiff applied to the Court for a review of the said judgment of 22nd February, 1950, by Motion. The plaintiff first moved *ex parte* and on the 11th March, 1950, Jackson, J., directed that the application must be made on notice. On the 13th March, 1950, the plaintiff gave notice of a Motion for Review of the order of the 22nd February, 1950. 10

p. 23.

p. 21, ll. 1 *et seq.*

15. In support of his Motion for Review the plaintiff swore an affidavit dated 13th March, 1950, in which he stated *inter alia* that he approached the Appellant on several occasions to produce receipts for ground rents and to accept the sum of £7 ordered to be paid upon production of receipts for ground rents by the consent judgment of 20 23rd March, 1939, that he was still prepared to pay the said sum of £7 or any sum or sums since accruing if ordered by the Court so to do and that the Appellant was still in possession of the premises.

p. 24.

16. An affidavit sworn by one Akosua Mansah, described as “ the mother and lawful attorney ” for the Appellant, indicated that the Appellant relied upon the order of Bannerman, J., of the 24th July, 1939, in answer to the plaintiff's application for leave to proceed to execution.

pp. 26-30.

p. 30, ll. 26 *et seq.*

17. By a judgment dated the 30th March, 1950, Jackson, J., gave his decision on the plaintiff's Motion for Review of the judgment of 22nd February, 1950. The learned judge decided that upon payment 30 into Court of a sum of £30 2s. 0d., to be deposited in favour of the Appellant, the Plaintiff should have leave to issue execution against the property No. 23, Bantama, Kumasi.

pp. 31-32.

p. 32, ll. 4 *et seq.*

18. The Appellant appealed against the last-mentioned judgment of Jackson, J., to the West African Court of Appeal. In her grounds of appeal the Appellant relied upon the order of Bannerman, J., of the 24th July, 1939, and *inter alia* contended that the judgment appealed against was in effect a review of the said order of 24th July, 1939, and that it was not competent for Jackson, J., to review or vary the order of another judge of concurrent jurisdiction. 40

pp. 34-36.

19. The West African Court of Appeal (Foster-Sutton, P., Coussey and Manyo-Plange, JJ.) upheld the judgment of Jackson, J., given on the 30th March, 1950. The judgment of Foster-Sutton, P., included the following passages:—

p. 35 ll. 7 *et seq.*

“ The action came before Woolhouse Bannerman, J., on the 23rd March, 1939, and a consent Judgment was entered, all the

parties were before the Court. The first condition of the Judgment entered by consent reads as follows :—

‘ The 4th defendant is to give up possession of the house in dispute within a fortnight from to-day’s date.’

* * * * *

“ The matter came before the Court again on the 24th July, 1939, on a Motion filed by the fourth defendant, under which she claimed a review of the Judgment I have just referred to. The learned trial Judge, upon that Motion, made the order which is set out at page 12 of the record. Having regard to the fact that the previous Judgment was a consent one, in my view, he had no power to review that Judgment unless the consenting parties agreed to such review, and there is no indication that they did so. p. 35, ll. 29 *et seq.*

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“ The plaintiff could have proceeded to execution on the consent Judgment as also could the fourth defendant against the first defendant, and had she, after production of the receipts, failed to recover the £7, referred to in paragraph 7 of the consent Judgment, she could have proceeded to execution against the plaintiff for that sum. The plaintiff let the matter rest for a number of years and the learned trial Judge against whose Judgment this appeal has been brought has suggested a reason as to why that was done. Be that as it may, under the Rules, having taken no further steps for over six years, when he ultimately decided to enforce the Judgment he was compelled to do what he did, that is to say, file a Motion for leave to proceed to execution.

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“ In my opinion Jackson, J., had jurisdiction upon that Motion to deal with the matter as he did. As has already been pointed out by a member of this Court, that part of his order which requires payment of the sum of £30 2s. 0d. is doubtful, but he was entitled to give leave to the plaintiff to proceed to execution.”

30 Coussey and Manyo-Plange, JJ., concurred.

p. 36, ll. 39-40.

20. On 27th June, 1952, final leave to appeal to Her Majesty in Council was granted. p. 38.

21. By an Order of Revivor made on the 24th June, 1954, Her Majesty in Council ordered that the Respondent should be substituted in place of the plaintiff, now deceased, and that this appeal should stand revived accordingly. pp. 38-39.

22. The Respondent respectfully submits that this appeal should be dismissed with costs for the following among other

REASONS

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(1) BECAUSE Jackson, J., had jurisdiction to grant leave to the plaintiff to issue execution against the property in question under the judgment of 23rd March, 1939.

- (2) BECAUSE the judgment of Jackson, J., dated 30th March, 1950, was right.
- (3) BECAUSE Bannerman, J., had no power to review the consent judgment of 23rd March, 1939, or to make the order dated 24th July, 1939.
- (4) FOR the reasons given by Jackson, J., in the judgment dated 30th March, 1950.
- (5) FOR the reasons given by Foster-Sutton, P., in the West African Court of Appeal.

RALPH MILLNER. 10

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